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Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 71.

THE BALTIMORE AND POTOMAC RAILROAD COMPANY AND THE PHILADELPHIA, WILMINGTON AND BALTIMORE RAILROAD COMPANY, PLAINTIFFS IN ERROR,

vs.

CATHARINE LANDRIGAN, ADMINISTRATRIX OF THE ESTATE OF THOMAS J. LANDRIGAN, DECEASED.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR PLAINTIFFS IN ERROR.

FREDERIC D. McKENNEY,
J. SPALDING FLANNERY,
Attorneys for Plaintiffs in Error.

WAYNE MACVEAGH,
Of Counsel.

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GENERAL STATEMENT.

This case comes before this court on writ of error sued out by the railroad companies, who were defendants below, to review a judgment of the Court of Appeals of the District of Columbia affirming a judgment of the supreme court of said District in favor of the defendant in error and plaintiff,

Catharine Landrigan, as administratrix, for the sum of $6,500.

The plaintiff declared in tort under the death statute in force in the District of Columbia and claimed damages in the sum of $10,000 for the alleged wrongful and negligent killing of her husband, Thomas J. Landrigan.

She asserted in the declaration that the defendant companies owned and operated a certain steam railroad in the city of Washington having tracks on Virginia avenue southwest crossing South Capitol street; that it was the duty of the defendants to guard and protect the public from trains and engines propelled upon said tracks and to securely couple together and properly equip their cars with safe and efficient brakes and to give timely warning and notice of the approach of all engines and cars moving upon said tracks to persons desiring to cross said tracks at the intersection of the aforesaid street and avenue; but that said defendants, on the 29th day of August, 1898, disregarding their duty in the premises, so negligently operated a car or cars at said intersection that the deceased, Thomas J. Landrigan, while attempting to cross said Virginia avenue southwest, without want of reasonable care on his part, was thrown down and run over by a car which defendants' employees were shifting upon one of said tracks.

The defendants pleaded the general issue, and the case came on for trial before Mr. Chief Justice Bingham and a jury, and resulted in a verdict and judgment in favor of the plaintiff for $6,500 and costs of suit.

FACTS.

South Capitol street, at its intersection with Virginia avenue, is divided by a parking or open space into two crossings—the southwest and southeast crossings—which were about fifty feet apart. AT BOTH CROSSINGS THE DEFENDANTS MAINTAINED SAFETY GATES AND ATTENDANT GATEMEN, AND FENCES EXTENDED UP TO THE GATES, SO THAT WHEN THE GATES WERE CLOSED OR LOWERED THEY COMPLETELY SHUT OFF THE RAILROAD TRACKS FROM THE FOOTWAY USED BY PEDESTRIANS,—"these gates are double gates, and if they are down it is impossible for anybody to cross the track without getting under them" (14). The gates at the southwest crossing were operated by a gateman whose box was situated at the northeast corner of said intersection, on the opposite side of the tracks from that on which the deceased, Landrigan, is supposed to have approached the crossing. At this crossing the defendants maintained and used four tracks—the most northerly, called the "reservation" or "No. 1" track, was used for freight and shifting purposes; the two intermediate tracks by north and south bound passenger trains, and the most southerly, called the "lead" or "ladder" track, was also used in shifting operations at this point. This "ladder" track was so called because it was a straight track, running from a point a square and a half west of the southwest crossing completely through the railroad yards of the company to the east as far as New Jersey avenue. Every other track in the railroad yard connected with it, and all the switches led into it (8). The eastern portion of it was constantly used for shifting,

but the west end—that part of the track west of the southwest crossing of South Capitol street—while used for shifting purposes when occasion required, was also used for the storage of cars containing coal and other material until such cars could be unloaded.

East of South Capitol street were the "Jersey yards," containing about sixteen tracks (14), which were used for storing freight and passenger cars of all descriptions; for loading and unloading freight, and for the making up trains. In the "Jersey yards" all outbound freight and passenger trains were made up and shifting operations were going on there constantly both day and night.

A little to the southeast of the crossings in question was the engine yard which included the many tracks leading to and from the round-house (14).

West of the crossing were the companies' property yards; their freight station at Ninth street and Maryland avenue; their main passenger depot at Sixth and B streets, and the main lines running south.

Every train of cars made up in the Jersey yards going to the depot, every freight car moving to or from the Ninth Street freight station, every shifting engine passing from the Jersey yard to the depot or to the Ninth Street freight station, and every engine coming from the South or from the Ninth Street freight yard or the Sixth Street depot on its way to the round-house passes over these crossings, and their use for shifting purposes and by empty and loaded cars and engines is almost continuous at pretty much all times of the day and night (19).

On the night of the accident, for some time before midnight, a shifting crew had been, and at the time of the ac-

cident, was, engaged in the Jersey yard in making up trains of passenger coaches for the transportation of troops to the South. In the course of operations it became necessary to "cut out" from among the cars standing on one of the tracks at the eastern end of the Jersey yard a Pullman sleeping car named the "Lylete." On the same track, in front of the Pullman and immediately next to it, was a tourist car. The Pullman car was equipped with what is known as a Janney coupler, while the tourist car was fitted with a Miller coupler. These couplers were both of what is known as the automatic type, but were of different patterns and not designed to couple together. To draw the two cars out on the "ladder" track, an ordinary link-and-pin coupling was made between them—that is, ordinary coupling pins were inserted in the holes made for such purpose in each coupler, and the pins were connected with a coupling link. Owing to the difference in height from the ground of the two automatic couplers, the link was slipped over the top of one coupler while it was put in the slot provided for it in the other (6).

On drawing the cars out of the side track a slacking or running together of the draft of cars occurred, which caused the link to twist over the head of one of the pins, as a result of which the cars parted, and the Pullman car, being the last car of the draft, began to move down the slight grade on the "ladder" track towards South Capitol street crossing. At the time the car broke away it had a light in each end and was equipped with the usual brakes. One of the brakemen had tried the brakes on the car before it was pulled out on the "ladder" track, and they then appeared to work all right (13); but after it became detached from the other cars and started down the grade, the brakes would not hold (13).

Members of the train crew attempted to put on the brakes at both ends of the car, but finding that they would not respond, and that the momentum of the car was increasing, they jumped off and followed it down to the crossing at South Capitol street. The car ran a little over a hundred yards (8), possibly 125 yards, passed over both crossings, and was brought to a standstill west of the southwest crossing by running into two flat cars containing stone or gravel, which were standing on the western end of the "ladder" track (8).

A passenger engine, referred to in the testimony as "Fenton's engine," was standing upon the most northerly of the four tracks at the southwest crossing and about ten yards west of it (12). This engine was partly on the crossing and about opposite the point where Landrigan was found (15). A train known as No. 78, the midnight passenger express for New York, was due at this crossing about 11.55 p. m. This train passed on the north-bound main track, which was immedialely adjacent to the south or "ladder" track. The runaway car and train No. 78 reached the crossing almost simultaneously, the runaway car having about gotten across when the engine of No. 78 began to cross (16).

AT THE TIME No. 78 AND THE "LYLETE" WERE PASSING OVER THE CROSSING "THE GATES WERE DOWN (CLOSED) ON BOTH SIDES."

At the time of the accident and for about eight years prior thereto, Landrigan had been employed by the defendant The Philadelphia, Wilmington and Baltimore Railroad Company as a machinist and assistant boss at its round or

engine house, which was located near South Capitol and I streets, about two squares southeast of the crossing in question (31). He was a member of the night force, and it was customary for the men engaged in night work to take an hour off for lunch between twelve and one o'clock midnight. At the date of the accident and for several years prior thereto Landrigan lived on the north side of Virginia avenue, northwest of the southwest crossing of South Capitol street. The most direct route from the round-house to his house was up South Capitol street to the southwest crossing, thence across the tracks to the north side of Virginia avenue. On the night in question he left his work at the round-house or machine shops about 11.50 p. m., and a few minutes later, about 12 o'clock, was found near the southwest crossing in an injured condition.

He was lying on the ground between the fence in front of the tool-house "and the outside rail of the 'ladder' track"; immediately before he was seen lying there the coach "Lylete" and No. 78 had passed over the crossing (12).

No eye-witness of the accident was produced nor is any known to exist. There is no evidence in the record tending to show where Landrigan was or what he was doing at the moment of receiving his injuries, nor is there any evidence tending to show whether he was struck by the runaway car or by No. 78. The jury was permitted to assume that he was struck by one or the other.

While lying on the ground at or near the scene of the accident and immediately after the "Lylete" and No. 78 had passed over the crossing, in response to the inquiry,

"How did this thing happen?" the injured man replied, "I came under the gates and something struck me, and a whole string of cars ran over me" (15).

He made no other statement as to the occurrence, but died a few hours afterward from the injuries he had received (22).

At the trial plaintiff admitted "that Landrigan went under the closed safety gates, and stood either on or by the side of the 'ladder' track" (19).

After passing under the gates to reach the south or "ladder" track, Landrigan crossed a clear space of fifteen or twenty feet in width between the gates and the nearest rail—from any point of which he could have had an unobstructed view of the approaching runaway car (18, 27, 29).

The night "was not a clear night nor was it a really dark night—there was no moon and there were a few clouds" (21). The crossing was lighted by street lamps located on each of the four corners, and there were electric lights on both sides of the track (9). The lamp in the dome of the "Lylete" "gave a bright light—you could see it all right," "you could see the light very plainly if you looked at it" (10).

The case was tried by the plaintiff upon the theory that her intestate while standing either upon or by the side of the southerly or "ladder" track was struck and run over by the runaway car "Lylete."

Assuming that defendant's employees had been guilty of negligence in their handling of the "Lylete," plaintiff, to avoid the conclusion, logically resulting from the facts above stated, that the deceased was guilty of such contributory negligence as would prevent her recovering damages for his death, offered evidence tending to prove—

1st. That the south or "ladder" track west of the southwest crossing was seldom used for shifting purposes, being ordinarily used for storing cars; and

2d. That the safety gates at this crossing were generally kept in the down or closed position from 10.30 or 11 o'clock at night until the early hours of the morning without regard to the immediate presence or absence of moving trains or cars, and that persons using the crossing between such hours, whether pedestrians or drivers of teams, were frequently compelled to call to the attendant gatemen to raise the gates when they wished to cross over, or, acting on their own judgment, crossed under the closed gates without such calling out; that her husband, who had been in the habit for several years of crossing the tracks at this point about midnight knew of this method of operating the gates, and that consequently the closed or down gates did not, as to him at least, constitute a signal or warning of a present or imminent danger.

On the first point the evidence was that "the 'ladder' track was a track that was used more or less frequently in shifting operations from one end of it to the other;" on the night of the accident it "had been in use in their shifting operations from about 7 or 7.30 o'clock; in these shifting operations they would go all the way down to the crossing

at South Capitol street if necessary;" witness did not remember having gone "all the way down there that night; but "on other nights they had been in the habit of going all the way and crossing South Capitol street when engaged in shifting operations; cars were sometimes placed on the ladder track west of the crossing to be unloaded or "just to get rid of them for a short while, or they would be put there temporarily during shifting operations" (Motley, p. 9).

"The lead or 'ladder' track is used all the time, backwards and forwards, on week days especially, and very frequently on Sundays for pulling cars in and pulling them out" (Willhoit, p. 15).

Webster testified that he had never seen any shifting or making up of trains on the "ladder" track west of the southwest crossing, but admitted that he had seen cars shifted in there, and that it would be necessary to pull them over this crossing to get them out (17); that the use of this crossing by engines and cars was almost continuous day and night (19). The plaintiff and her brother, Kappel, testified that the rails of this ladder track near the southwest crossing were rusty (23, 31); but Wilkinson never noticed anything unusual in the appearance of the rails of this track—to him "all of the rails looked pretty generally alike" (27). Oeser testified that this end of the track was always filled with coal cars, and Kappel said that he had seen cars on the west end of the ladder track hundreds of times, and knew that they were put in there and pulled out (24). As this track only had an outlet to the east (24), all cars put in and taken out of the west end of it necessarily had to pass over the southwest crossing.

On the second ground the evidence was that in the month of August, 1898, and prior thereto the safety gates at this crossing were generally kept down "after ordinary bedtime," whether trains were passing or not; witness had stood on the side where Landrigan was killed, "and crossed right over without hesitating, because he found that (being down) was the regular condition of the gates, whether a train was passing or not" (Webster, pp. 16, 17).

Story testified that he had been traveling over this crossing in the day and night time for fifteen or twenty years, and would pass there sometimes as often as six or seven times in one night; that during this period he had passed there at night and called the watchman several times to get the gates up. The gates were mostly down all the time when trains were passing; that when he would be going home, somewhere between 12 and 4 o'clock in the morning, *sometimes* the gates would be down and he would have to call the gateman to get past (20); that he usually crossed there in a carriage, and the most trouble he had at night with the gates occurred after 12 o'clock; sometimes they would put the gates down and maybe go to sleep or something like that, and he would have to halloa to get the gates up; that he could clearly say this had happened about a dozen times. He had frequently come to these gates at night, both before and after 12 o'clock, when no trains were passing, and found the gates up, and crossed without any trouble, and he had done this very much more frequently than he had been stopped by the gates being down (20). He had frequently come there after 12 o'clock and found the gates up, and had found them that way very often (21). In response to a question by his own counsel as to whether in passing at night he

found the gates more often down or more often up, he replied, "Well, I found them up, you know, but on a few occasions I found them down—twelve or fifteen times, I recollect"—that is, twelve or fifteen times in the ten years that he had been crossing there (21).

Martin, who had occasion to use this crossing very often both day and night, "always found the gates down at the southwest crossing in the summer of 1898 after 10 or 11 o'clock at night, whether trains were coming or not (25); he mostly approached the gates from the north after about 9 or 10 or along about 12 o'clock;" the gates were always down, and during the fifteen years that he crossed there he had had to wake up the watchman two or three times probably; on other occasions when he would come there he would call to the watchman and he (the watchman) would raise the gates if there was no train coming; he thought it was the custom to leave the gates down, and thought it was a safeguard; he did not know any better then and deemed it a proper thing, because of the small amount of use of that crossing at that time of night, to have the gates raised when anybody wanted to go through if no train was approaching; "if there was any doubt as to whether any train was approaching, the watchman would always call to the watchman on the other side and ask him if a train was coming;" "he regarded these precautions of keeping the gate down at that time of night and of calling to the watchman on the other side to know whether a train was coming or the track clear as a safe and proper thing to do" (26).

Wilkinson testified that he had crossed at this crossing for 12 or 15 years, "and at night-time, after the usual bedtime, the gates were usually kept down, whether trains were com-

ing or not; he often had to ask the man to hoist the gates, and sometimes would have to wake him up; he would approach the gates from the south any time from half past six or seven o'clock on, and usually found the gates down;" "sometimes there would be two or three trains waiting there; sometimes you might find trains passing or that had just passed, and they would then let you through, or maybe they would hold you there until another engine would pass down;" generally he would not stay there, but would go through and take whatever risk attached to it; he had gone under the gates and over the crossing when cars or engines were approaching; he could not say that he has ever come down there and found the gates up when no trains, cars, or engines were moving in that vicinity; and when he found the gates down he would just go under the gate and go on without calling to the watchman to raise the gate" (27).

Oeser testified that "the gates after bedtime were kept down all the time; he never saw the gates up after bedtime except when some one would ask to have them raised; he would very often catch trains at the crossing, they generally made a practice of standing right there or of moving up and down upon that crossing; sometimes there would be no trains there and at other times there would be two or three trains, one right after the other; on four different occasions in the course of eleven years' use of the crossing he had to wake up the watchman in order to get him to raise the gates; the tracks at this crossing were in very frequent use; cars, trains, and engines were crossing up and down those tracks pretty much all the time; the crossings down there are dangerous" (28).

Tripp testified that "in the summer of 1898, including the month of August the gates at this crossing after the usual bedtime were mostly kept down; he has seen them down at 9 o'clock, and presumes they were kept down all night; every time he saw them they were down whether trains were passing or not." "When people approached the crossing at night and wanted to cross, if they were walking, they would generally stoop under the gates and walk across; if driving they would have to holler to the watchman to raise the gates" (29, 30).

Kappel, a brother of the plaintiff, testified that "he had occasion to cross the southwest crossing, at night immediately prior to and about the time of Landrigan's death; the gates as a general thing, in the night-time, were down;" "after eleven o'clock (at night) he generally found the gates down whether trains were passing or approaching or not" (22). Witness was employed on the day force at the defendant's round-house; he had worked on the night force, but not for 2½ or 3 years before Landrigan's death (27).

Over objection of defendant's attorneys witness was then permitted to testify that when he and Landrigan were working together on the night force they "used to go home together for two or three months; the gates were down and they had to crawl underneath the gates to get home; the gates were kept down and they very seldom ever saw the gates up; they crossed the tracks between 12 and 1 o'clock at night and between 6 and 7 o'clock in the morning" (23).

Plaintiff having rested, counsel moved the court to instruct the jury to return a verdict for the defendant, which motion was overruled, and an exception to the ruling hav-

ing been noted (32) the defendant declined to introduce any testimony, and the court submitted the case to the jury upon the following, among other, instructions, to each of which instructions exceptions were duly taken and noted:

"In the absence of all evidence tending to show whether the plaintiff's intestate stopped, looked, and listened before attempting to cross the south track, the presumption would be that he did. But that presumption may be rebutted by circumstantial evidence, and it is a question for the jury whether the facts and circumstances proved in this case rebut that presumption, and if they find that they do, they should find that he did not stop and look and listen, but if the facts and circumstances fail to rebut such presumption then the jury should find that he did so stop and look and listen. In order to justify them in finding that he did not, all the evidence tending to show that should be weightier in the minds of the jury than that tending to show the contrary" (substitute Nos. 1 and 6, pp. 32, 33).

Plaintiff's second and third prayers, which were granted and given by the trial court, were as follows:

"2. The jury are instructed that if they believe from the evidence that the gates at the crossing where the deceased received his injury were generally kept down at night from 10.30 or 11 o'clock until the early morning, without regard to the approach or presence of a car, a train, or trains or locomotives, and shall further conclude from all the facts and circumstances of the case that the deceased had knowledge of that fact, then the circumstance that the gates at the intersection of South Capitol street were down at the time of the accident was not of itself a warning to him of the presence of danger, and contributory negligence cannot be imputed to him from that fact alone."

"3. While knowledge by the deceased of the presence of the Fenton engine on the north track or partly upon the South Capitol Street crossing and the approach of No. 78 upon one of the central tracks at or near the time of the accident might or would indicate the presence of danger on or near those tracks, it is for the jury to determine upon all the facts of this case whether it was a want of ordinary or

reasonable care and prudence upon his part to be upon the south track, at the point upon said last-named track at which they shall find from the evidence the accident occurred" (p. 32).

The trial court refused to grant or instruct the jury in accordance with the following prayers submitted by the defendant, viz:

"1. If the jury shall find from the evidence that at the time the plaintiff's intestate approached the crossing in question the safety gates were closed or lowered and that said intestate went under said gates and stood upon or near enough to the south or 'ladder' track at or near the said crossing to be struck by a passing car and that while so standing upon or near said track he was struck by a car moving upon said track and received the injuries which resulted in his death, then the plaintiff's intestate was guilty of contributory negligence and the verdict must be for the defendant" (33).

"2. If the jury shall find from the evidence that at the time the plaintiff's intestate approached the crossing in question the safety gates were closed or lowered, then they are instructed that the gates so closed or lowered were a warning to all persons approaching said crossing that cars, engines or trains might be expected to pass over and upon all or any of the railroad tracks at said crossing while the gates remained so closed or lowered, and if the jury shall further find from the evidence that the plaintiff's intestate did not heed such warning but went under the closed gates and was struck by a car moving upon one of the defendant's tracks at said crossing and thereby received the injuries which resulted in his death, the plaintiff cannot recover in this action and the verdict must be for the defendant" (33).

"3. If the jury shall find from the evidence that at the crossing in question and on the occasion complained of the defendant maintained four (4) tracks, the most northerly of which was used for the passage of freight trains and for shifting purposes, the most southerly, commonly called the 'ladder' track, being used for shifting trains and storage purposes, and the two intermediate tracks for the general business of the company, and that the defendants also main-

tained at said crossing safety gates operated by a gateman and at the time the plaintiff's intestate approached said crossing on the night of the accident these gates were closed or lowered and a freight or mixed train, with an engine attached, was standing upon the most northerly track on said crossing, and a shifting engine with a train of cars was operating upon said southerly or 'ladder' track in the railroad yards immediately east of said crossing and a regular express train was about due at said crossing, then the jury is instructed that said gates were closed or lowered for all trains, cars, or engines which were moving or passing or which might move or pass upon all or any of said tracks at said crossing and were a warning of danger which the plaintiff's intestate was bound to heed, and if the jury shall find that the plaintiff's intestate met his death by going under said gates and upon or so near to one of said tracks as to be struck by a car moving on said track, he was guilty of negligence contributing to the accident, and the plaintiff cannot recover in this action" (33).

"6. The jury are instructed that no evidence has been submitted in this case upon which they would be justified in finding the existence of any usage or custom to keep the crossing gates at the crossing in question lowered from 10.30 or 11 o'clock in the evening until an early hour in the morning irrespective of the passage of trains, cars, or engines" (35).

"11. It appearing from the uncontradicted evidence in the case that the defendants maintained at all hours of the night a gateman in charge of the gates at the crossing in question who raised and lowered said gates as occasion might require, and it further appearing from such evidence that such gateman was accustomed to open or raise said gates for the passage of pedestrians or vehicles when it was safe to do so, and it further appearing that the crossing in question being adjacent to the shifting, storage and engine yards of said defendants and between such yards and their passenger and freight stations in the city of Washington and that the main tracks leading to and from said station also passed over the same, said crossing was an especially dangerous place, the jury are instructed that in the absence of any evidence tending to show that the plaintiff's intestate, upon approaching said crossing and finding the gates be-

tween him and the tracks lowered or closed, made any request of the gateman to raise or open the same or submitted any inquiry as to whether any engines, cars or trains were approaching said crossing before he went under said gates and entered upon the crossing within the same and thereby received the injuries which resulted in his death, said intestate was guilty of negligence directly contributing to his own misfortune and the plaintiff cannot recover" (35).

And to the refusals to grant each prayer, exceptions were duly and seasonably noted (35).

The court, at the instance of defendants, then instructed the jury as follows:

DEFENDANTS' 7TH PRAYER.

"The jury are instructed that there is no evidence in this case from which they would be justified in finding that the lead or ladder track at the point near which the plaintiff's intestate was injured was an unused track, but on the contrary, as the undisputed evidence shows, said track was used at irregular intervals, more or less, and such use made it incumbent upon the plaintiff's intestate to exercise due care and caution, under all the circumstances, before attempting to cross the same, and if the jury shall find that plaintiff's intestate did not use such due care and caution and did not look and listen with attention for any train or car that might be approaching on said track, and that his failure so to do contributed to his injury, then their verdict should be for the defendant."

DEFENDANTS' 8TH PRAYER.

"The jury are instructed that unless they are satisfied from the evidence that the plaintiff's intestate was injured by being struck and run over by the Pullman car which was moving on the south or 'ladder' track at the crossing and on the occasion in question, then their verdict should be for the defendant."

ASSIGNMENTS OF ERROR.

The trial court erred :

1. In refusing to direct a verdict for the defendants.

2. In refusing to charge the jury as matter of law that the closed or down safety gates at the crossing on the occasion in question constituted a notice or warning to all persons approaching the same that the defendants were about to use some or all of the tracks at the crossing for the purposes of its business, and as it was conceded that the deceased had knowingly and deliberately disregarded such notice and had brought upon himself the injuries which resulted in his death by going under said gates and negligently standing upon or near one of defendants' tracks then in use, the plaintiff could not recover.

3. In granting the plaintiff's second prayer (32, 38), which instructed the jury that if they found that the gates were generally kept down from a late hour at night until early in the morning, and that the plaintiff's intestate had knowledge of that fact, then the fact that the gates were down at the time of the accident was not of itself warning to him of the presence of danger.

4. In leaving it to the jury to say that the deceased was injured by the "Lylete," there being no evidence from which it could be reasonably found that he was injured by that car rather than by the express train No. 78.

The only evidence on this point was Kappel's statement

that after the accident he saw blood "and a little proud flesh right alongside the south track, which is called the ladder track" (21), and the deceased's own statement that "*a whole string* of cars ran over me" (15).

5. In charging the jury that in the absence of all evidence tending to show whether the deceased stopped, looked and listened after passing the closed gates and before attempting to cross defendants' tracks, the presumption was that he did so, the undisputed evidence bearing on that point being that a person standing on the clear space between the gates and the outer rail of the south track would have had an unobstructed view to the east for a distance of about 100 feet or more (29, 27); that the advancing end of the runaway car was furnished with a lighted lamp which gave forth a bright light (10, 14), and that a man "standing on the track some distance from the advancing end of a car showing such a light could see the illuminated end of the car," and "if he were looking up the track he could see the car if he were not too far away" (30).

ARGUMENT.

It may be noted at the outset that the particular acts of negligence with which defendants were charged and which were alleged to have brought about Landrigan's death were:

a. That defendants' negligently, carelessly, and improperly coupled together their cars;

b. That they negligently, carelessly, and improperly failed to furnish and equip said cars with safe and efficient brakes; and

c. That they negligently, carelessly, and improperly failed to give any notice or warning of the movement of said cars by having or keeping a light or lights upon the ends of said cars or by the ringing of bells or blowing of whistles, or by giving other signs, notices, or warnings.

It being specifically alleged that the deceased, while in the act of crossing said railroad track, as he had a right to do, exercising due care, "was thrown down and run over and killed by one of said cars, being shifted as aforesaid, breaking loose and running back upon him without notice or warning."

The evidence, all of which was adduced by the plaintiff, was, as to point a, positive that the coupling used on the occasion in question "was a very ordinary coupling and is made right along;" witness had "never seen it break loose before;" "it was customary to couple cars by putting the link on top instead of through the slot" (7); that two Janney or two Miller couplers will couple together without requiring the use of a link and pin, but a Janney and Miller coupler will not couple of themselves, and "you have to use a link and pin to couple them" (8). In shifting operations in the yard different kinds of cars would be handled, and "it was an ordinary occurrence at that time in the yard to couple cars up with Miller and Janney couplers on them;" "they must be coupled by putting a pin in the Janney and another pin in the Miller and connecting the two with a link; this is the ordinary way of coupling two such cars, and the only way the witness knew to couple them" (9); "the coupling was safe enough to pull the car out of the yard, and that was all that was wanted; it did not do it that night because it broke loose; the couplings 'slipped around'

when they were going around the curve, and that had a tendency to make them come apart." Witness supposed "it was due to the slack caused by coming over the switch on the ladder track" (10, 11). "It is impossible to couple a-Miller and a Janney together; it was on a curve, and there fore they used a link and pin: it was a secure coupling to pull the car around in the yard, but it was not a safe coupling to run over the road; it was sufficient for the yard and was very frequently done" (12, 13).

As to point *b* the evidence was that one of the shifting crew, Willhoit, "when they were pulling the car out on the straight track tried the brake and it appeared to be all right;" when the cars parted he "called for Wilber to help him put the brake on and they did all they could to stop the car, but the car had got too much start; the brake seemed to work all right—he did not have any fault to find with the brake, only the car had gotten too much start; the brake did not do any good because the car had too much start; you sometimes apply a brake and it does not 'take up' right at first" (13).

As to point *c* it was conceded that the safety gates at the crossing were down; that no one could get by them without going under them; that the deceased did go under them; that after passing the gates, and before reaching the tracks, he had an unobstructed view to the east (18); that the advancing end of the Lylete was illuminated by a brightly burning lamp in the dome of the platform (10), and that deceased could have seen the car at a distance of 100 feet or more (29) if he had looked that way.

Testing plaintiff's specifications of negligence by the evidence adduced in support of them, wherein had the defendants failed in their duty towards the public in general or the deceased in particular? The point of accident was one of extreme and ever-present danger; it lay at the throat of the main shifting yard of the defendant in this District and between that yard and the company's freight station and main passenger depot. It was in almost constant use both day and night by passing engines, cars, and trains; each of the four tracks which crossed it were "live" tracks, being used for railway purposes as occasion required. The deceased was a railroad employee and thoroughly familiar with the crossing and its use by the defendants. No one knew its attendant and ever-present dangers better than he and no one better than he knew the significance of the silent but commanding protest emanating from the closed gates. He elected to disregard their warning. The presence of Fenton's steaming engine standing in his path, the roar of No. 78, the approaching express train eastbound, the prevalence of busy, shifting engines, and the possibilities of shunted or drifting cars held no terrors for him. On the distant side of the tracks beyond the safety gates barring his approach, and proclaiming the presence of danger, lay his home and a midnight lunch; impatient appetite overcame discretion. Disregarding all warnings, self-confident, and disdainful of dangers long familiar, refusing to delay, he took the risks incident to immediate crossing and sacrificed his life.

There was no allegation in the declaration that the gates at this crossing were improperly managed or operated or that the defendants or any of their officials had notice of

that fact, if it was a fact. The defendants were not put upon notice that they would be called upon to meet such a charge, and it was clear error on the part of the trial judge to submit to the jury evidence which had no bearing on the issues presented by the pleadings.

But apart from this how could the fact that the gates may have been frequently lowered when no train or car was actually at or on the crossing excuse the deceased or avail the plaintiff when it appears that on the occasion of the accident and when the deceased violated the warning of the gates not to approach the crossing three of the four tracks which lay across it were being immediately and actively used by moving cars and trains.

What was the direct and proximate cause of the injury to the deceased? Did it arise from the negligence of the defendant's employees, or was it the immediate result of a voluntary exposure of himself to a peril which a cautious and prudent man could and would have avoided? Did it not directly follow a refusal to be bound or influenced by well-known and easily understood warnings of danger and an exhibition of recklessness and want of care too flagrant to be condoned?

The question which should have been made controlling by the trial court and which is the real point for argument here is as to the contributory negligence of the deceased himself. Upon the facts disclosed by this record the law would seem to be well established. The crossing gates were closed and approach to the tracks effectively barred. The tracks at the crossing were in active and present use for railway purposes, both in the passage of trains and in shifting operations. The deceased, scorning the closed gates,

pressed under them, heedless of perils that would have deterred the bravest of men, without pausing or looking, for if he had paused, or even looked without pausing, he would have seen the lighted car approaching on the track nearest to him. He stepped upon the track and either stood on it or so near to it that he was struck and run over either by the "Lylete" or train No. 78. In either event the plaintiff was where he had no business to be at that time, and the defendants, having given to him full warning of his danger, were rightly using both the crossing and its tracks in the proper conduct of their business. It was conceded on the trial, and the trial judge so charged, that if the deceased was injured by coming in collision with No. 78, plaintiff could not recover; but it was left to the jury to guess, for there was no evidence from which it could be found that he was injured by the "Lylete." On principle it must also be conceded that if defendants' employees in the course of their shifting operations had intentionally backed the "Lylete" upon and over the crossing and in so doing had collided with and injured the deceased, plaintiff could not have maintained this action. How, then, can defendants be held liable to respond in damages for doing unintentionally that which they would have been free to do intentionally without liability, all preliminary precautions being taken in each instance?

In the case of Stewart *vs.* Washington and Great Falls Railway Co., decided by the Court of Appeals of the District of Columbia November 4, 1903, in the opinion of the court by Alvey, Chief Justice, it was said:

"With respect to the alleged negligence on the part of the defendant company, a careful examination of the evidence

contained in the bill of exception has brought us to the conclusion that the court below committed no error in directing a verdict for the defendant. There is no sort of ground shown for contending that there was negligence on the part of the motorman or conductor in running the car at the time and place where the accident occurred. They were acting strictly within the line of their duty, and did nothing of which the plaintiff could justly complain. Indeed, we do not understand that there is any attempt to impute negligence to them. And it is conceded that the defendant company had full control and right to run their cars over their railroad at such time, and over such of their tracks, as they might deem it necessary for the execution of their work; and that it was no violation of duty to any one to run their cars upon one track rather than another, where the exigency or convenience of the service undertaken by them rendered it proper, in their judgment, so to do. In operating a double track railroad the owner is bound by no rule that requires that he shall use the right-hand track for the running of cars in one direction, and the left-hand track for the running of cars in the reverse direction. He may run his cars on both tracks in either direction, as the needs of the business may require. But it is contended that if there be change made in the operation of a railroad, either as to the time of running, or the change of direction of trains on several tracks, there should be notice given of such change to employees and others concerned, so that they may pursue their course accordingly. This would certainly be an unusual requirement, and one that might be very embarrassing in the operation of a railroad on important occasions. All parties coming in contact with the operation of a railroad must be presumed to know that the owner has entire control and direction of the course and manner of operation, and so long as there be no contractual obligations or public duties violated, the owner must be allowed to exercise his own judgment and discretion in the use of his property."

In that case the plaintiff, an employee of the defendant, while going to his place of duty, walking along the defendant's tracks, was struck and injured by one of defendant's

cars then being propelled along that track in a direction opposite to that in which it was customary to move cars over it.

In negligence cases the distinction between remote and proximate causes is recognized and carefully defined.

Whenever two acts or causes unite to produce a given result involving a damage, the controlling cause, if any, is regarded as the proximate cause, though it may be the further removed in point of time.

But where the two causes are separate and independent, then that cause which is the nearest in point of time to the exposure is regarded as the proximate and direct cause, and the other as secondary and remote.

Insurance Company *vs.* Boon, 95 U. S., 130, 131.
Scheffer *vs.* Railroad Company, 105 U. S., 249.
W. & G. R. R. *vs.* Hickey, 166 U. S., 528.

In the case of Cullen *vs.* Railroad Company (8 D. C. Appeals, 69), which possesses many points of similarity to the case at bar, a boy after running around the closed gates of the defendant company, in attempting to cross the tracks, stumbled in a hole in the planking between the rails and was knocked down and run over by an engine of the defendant. It was claimed that the defendant was negligent in allowing the hole to remain in the crossing, in not giving notice of the approach of the engine, and in the failure of the engineer to keep a lookout ahead. But the court said that all of these acts of negligence had occurred before the exposure of the deceased to danger and afforded no excuse

for his contributory negligence. The following extract from the opinion of the court is particularly applicable:

"The acts of negligence on the part of the defendant relied upon in this cause to relieve the deceased from the consequences of his own contributory negligence, are the primary and only acts of negligence charged against the defendant in the first instance, namely, the absence of a fence, an unlawful rate of speed, and the fact that the engineer was not looking in the proper direction. These had all supervened before the exposure of himself to danger by the deceased; and it seems to us that it would be a perversion of the law of negligence to hold that, because they were continued after the deceased had exposed himself to danger and without the occurrence of anything which would give notice or knowledge of such exposure, yet the fact of the exposure changed the character of the defendant's action from negligence to recklessness" (Op., p. 74).

Assuming for the argument that the defendants had been proven guilty of the negligencies charged in the declaration, it is submitted that they had all supervened before the voluntary exposure by the deceased of himself to the obvious dangers.

So far as we are advised, the decided cases are an unit in deciding that it is negligence *per se* for a wayfarer to disregard the warning given by down or closed gates at a railroad crossing.

Such conclusion is the natural and seemingly inevitable corollary of that other principle, now so well settled as to be no longer disputable, that to one about to cross at a railroad crossing, in the absence of an obvious danger, open or uplifted safety gates are an invitation.

In an action against a railway company for injuries received at a grade crossing, where it appeared that plaintiff's intestate attempted to cross the tracks at night after the gates had been lowered, the supreme judicial court of Massachusetts held that intestate's contributory negligence barred recovery by his personal representatives, as railroads from the necessity of the case have the right to the exclusive use of grade crossings when their trains are passing, it being their duty to give suitable warning of such passing trains to travelers upon the highway. If they do this and the traveler disregards the warning, and insists upon crossing, he does so at his own risk. The court said:

"In this case the intestate was warned by the lowered gates that it was dangerous for him to cross the track, and it was his duty to wait until the gates were raised; he voluntarily entered upon the track notwithstanding the warning and without excuse. This negligence on his part caused the accident, and the consequences of his rashness cannot be visited upon the defendant. *It is no answer to say that he may have supposed that the gates were down because a particular freight train was passing*, and he was willing to take the risk from that. He had no right to suppose so. It was negligence for him to enter upon the track when he was warned that the railroad required the exclusive use thereof."

Granger *vs.* Boston & Albany R. R. Co. (Morton, C. J.), 146 Mass., 276.

See also Allerton *vs.* R. R. Co., 146 Mass., 241.

Schmidt *vs.* Phila. & Reading R. R. Co., 149 Pa. St., 337.

Where a train at dusk was waiting on a certain track, and a man intending to become a passenger thereon disregarded closed safety gates, and while crossing an intermediate track was injured by another train running without a headlight, it was held that his contributory negligence barred his re-

covery, and a nonsuit granted on the trial was affirmed on appeal.

Debbins *vs.* R. R. Co., 154 Mass., 402.

Where a child of eleven years attempted to cross several *railroad tracks at a street crossing where safety gates were* closed and was killed in the attempt, her personal representatives, seeking to recover for her death, were nonsuited on the trial, and this action of the trial court was affirmed by the appellate court on appeal, that court holding that a railway company has the right to the exclusive use of a crossing when its trains are passing thereon, and if it gives a warning of such use which the traveler disregards he does so at his own risk. Lowered gates over a crossing are a sufficient warning, and if they enclose several tracks no one has a right to suppose that they are lowered merely because of a switching engine then in sight. In the case at bar the child being familiar with the crossing and using it several times a day, the only proper inference is that she understood and took the risk.

Marden *vs.* Boston & Albany R. R. Co., 159 Mass., 393.

Persons who disregard the warning of safety gates when the same are being lowered and receive injury thereby are guilty of contributory negligence barring their recovery.

Peck *vs.* R. R. Co., 50 Conn., 379.

If a driver approaching a crossing is warned by a flagman to stop, and in disregard of such warning he goes forward

and is injured, he is barred from recovery by contributory negligence.

B. & O. *vs.* Colvin, 118 Pa. St., 230.

Where safety gates which covered the driveway of a street, but not the footway, were down, and a pedestrian, familiar with the crossing, attempted to cross and was killed by a train backing, which gave no signal, and the view of which was impeded by other cars, a nonsuit was entered by the trial court for contributory negligence in disregarding the lowering of gates over the driveway. On appeal this action of the court was affirmed, it being held that the gates were a warning to foot passengers as well as to vehicles, and *when they were down they were down for all trains moving or passing at the time and not on account of a particular train.*

Cleary *vs.* R. R. Co., 140 Pa. St., 19.

Safety gates at a railroad crossing over a city street are a warning of the passing of trains, not only to vehicles, but also to pedestrians, and if in disregard thereof a pedestrian passes a closed gate in broad day, enters upon a crossing, and while watching one train is struck by another, his contributory negligence will prevent a recovery. "In the case at bar a train was approaching, the gates were down as they should be, and the plaintiff was thereby warned of danger. *It was a matter of no moment whether the gates were always down or not.* In this particular instance the gate was down and the defendant discharged its duty in that regard. If the plaintiff had performed his duty he would not have been injured."

Sheehan *vs.* R. R. Co., 166 Pa. St., 354.

A pedestrian came to a crossing as the safety gates were being lowered thereon and an approaching train was in sight. He ran under the gates and crossed the track in safety before the train and turned to watch its passage. While so engaged he was killed by another train suddenly coming around a curve. On the trial a verdict for the defendant company was directed by the court because of contributory negligence in the plaintiff's intestate, and this direction was affirmed on appeal.

Duvall *vs.* Mich. Cent. R. R. Co., 105 Mich., 386.

When a man familiar with the place attempted to cross at night tracks when safety gates were closed, and while avoiding one train was struck by another backing up without a light or man on its approaching end to give warning, and although many persons customarily made similar crossings when these gates were down, plaintiff was nonsuited at the trial for contributory negligence, which action was affirmed on appeal, the appellate court holding that where safety gates are maintained at city crossings it is the duty of travelers, observing that the gates are down or about to be let down, to stop until they are raised before proceeding. The presence of the gate across the street says to the traveler in a manner not to be misunderstood that such tracks are to be presently used for the passage of trains. The track itself is a general notice of danger calling upon the traveler to look and listen for approaching trains; but the presence of the gate across the highway is more. It is a specific notice that the danger of going upon the track is immediate, and that no person of ordinary care should assume it without expecting to take all the risks upon himself. It is no excuse for

disregarding such warning that persons were accustomed to cross at that place when the safety gates are down, for the doing of an act so obviously dangerous constitutes negligence as a matter of law, regardless of custom.

Douglass *vs.* R. R., 100 Wis., 405; 76 N. W., 356 (1898).

In Railway Company *vs.* Schneider, 45 Ohio St., 678, which related to a fatal injury at a grade crossing, the deceased was held not to have been guilty of contributory negligence, because "an open gate with a gateman in charge is notice of a clear track and a safe crossing," and "it is not negligence in the persons approaching to pass to the track through the open gates without stopping to listen."

In Railway Company *vs.* Ehlert, admr., 63 Ohio St., 320, 326, where the deceased met his injuries by going upon the tracks in spite of the closed gates, the court, referring to the Schneider case (*supra*), said:

"The rules by which liability is determined are to be applied impartially." "In such circumstances the company cannot be held liable because it does not give the warning which its obvious preparation authorizes the public to expect, and liable as well, although it gives the warning." "The allegation that the gate was lowered across said street for the passage of a long freight train" indicates a misconception of the significance of closed gates. They signify that the space between them, whether occupied by a single or a double track, is for the time being, to be used exclusively for the passage of trains. It would not be practicable to give separate warnings for

each track, nor is there any necessity for such warning. The conclusion reached in Railway Co. *vs.* Schneider, *supra*, was justified by the object of diminishing the frequency of collisions at grade crossings. That object will be promoted by requiring persons approaching such crossings to heed the warning when it is given."

The Court of Appeals of the District of Columbia in the case at bar announced an extraordinary view of the effect of closed safety gates at railroad crossings. In its opinion (Record p. 61), the court says:

"Deceased was familiar with the crossing and the gates gave him no notice of anything that he did not know in respect of the number, proximity and *use* of the tracks."

The obvious deduction from such assertion being that the deceased was at liberty to put his personal knowledge and past experience against the warning conveyed by the closed gates and to decide for himself, with full reservation of the liability of defendants to make good any damages which he might suffer in event of deciding wrongly, whether he would pass the gates and cross the tracks or not.

Such argument and deduction must be wholly fallacious and without foundation in right reason, or recognized law. If permitted to prevail, the maintenance and operation of safety gates at railroad crossings would be robbed of their proper effect and results. If one approaching a railroad crossing is at liberty to rely upon his own knowledge, real or imagined, of the course of operations there and the dangers to be encountered in then crossing the tracks and without being guilty of contributory negligence may disregard closed gates and other recognized signals of danger at such points,

we would have the anomaly in law of a railroad company free to conduct its business and move its cars and trains over its tracks as its needs or business required, with full liberty, while exercising care and proper caution, to change its schedules and its course of operations as and when it saw fit and without previous notice to the public, closing its crossing gates as a warning to persons in the vicinity that it had need of and was about to use the tracks inclosed thereby, and yet each individual approaching the tracks left free to decide for himself whether it would be safe for him to go under the gates and cross the barred tracks, and, having decided to cross, in the event of injury, such individual would be held to have been free from fault, because, forsooth, prior to the fatal day he had observed that the railroad company was accustomed to use such track only in a particular manner or at certain hours.

Such a rule must result in permitting each individual approaching a railroad crossing to determine for himself his legal duty in the premises irrespective of closed safety gates or other signals or warnings of danger, and would make the maintenance and operation of such safeguards but an useless expense.

Our fifth assignment of error is based upon the refusal by the court to give the defendants' fifth prayer (34, 35) and the giving of the court's substitute for the plaintiff's first and sixth prayers (32, 39).

The defendants' fifth prayer was as follows:

"5. The jury are further instructed that there is no presumption of law that the plaintiff's intestate did so look and listen before going upon or dangerously near to the

tracks at the crossing and on the occasion in question, but on the contrary the law requires that this precaution on the part of the plaintiff's intestate shall be fully established to the satisfaction of the jury by a fair preponderance of the evidence in the case, and the jury are instructed that there is no evidence in the case from which they can find that said intestate did so look and listen" (34, 35).

The court's substitute for the plaintiff's first and sixth prayers was as follows:

"In the absence of all evidence tending to show whether the plaintiff's intestate stopped and looked and listened before attempting to cross the said south track, the presumption would be that he did. But that presumption may be rebutted by circumstantial evidence, and it is a question for the jury whether the facts and circumstances proved in this case do rebut that presumption, and if they find they do they should find that he did not so stop and look and listen, but if the facts and circumstances fail to rebut such presumption, then the jury should find that he did so stop and look and listen. In order to justify them in finding that he did not, all the evidence tending to show that should be weightier in the minds of the jury than that tending to show the contrary" (32, 39).

There was no affirmative evidence tending to show that the deceased looked and listened either before passing the gates or on nearing the tracks. The negative evidence was that the night was neither dark nor yet light; there was no moon and there were some clouds; the crossing was well lighted by both gas and electric lights; the view of one approaching the tracks while crossing the space between the gates and the first rail of the south track was unobstructed; the car "Lylete" was moving along that track from the east towards the west; its advancing end was well lighted and the light could have been seen for an hundred feet or more by any one who looked up the track towards it.

Either Landrigan did not look or, having looked, he disregarded what he saw. In explaining the occurrence he made no mention of having looked up and down the tracks before venturing upon them, and if his statement is to be accepted at all, and this cannot be denied, it should be accepted as conclusive, and the case should also have been taken from the jury on this ground, for by his reference to "a whole string of cars" he must have meant the express train No. 78, and it was conceded that if he was injured by that train he could not recover.

If he did not look and listen before attempting to cross the tracks, or if he looked and failed to heed the warnings of his senses, he was guilty of such contributory negligence as will prevent plaintiff from recovery here.

"Judging from the common experience of men, there can be but one plausible solution of the problem how the collision occurred. He did not look, or if he did look he did not heed the warning and took the chance of crossing the track before the train could reach him. In either case he was guilty of contributory negligence."

Northern Pacific R. R. Co. *vs.* Freeman, 174 U. S., 384.

"When to look is to see, the simple utterance that one did look and could not see will be disregarded as testimony by the court."

Hook *vs.* Mo. Pac. Ry. Co., 63 S. W. R., 360.
21 A. & E. R. R. Cas. (N. S.), 787.

The true rule in cases of this character is that there is no presumption of law either way or in favor of either party.

"If a traveler by looking, could have seen an approaching train in time to escape, it will be presumed, in case he is injured by collision, either that he did not look, or, if he did

look, that he did not heed what he saw. Such conduct is held negligence *per se*."

Beach on Contributory Negligence, sec. 182.

"The law will not presume that a plaintiff has been negligent, in the absence of some evidence tending to show it; but when his evidence tends to create the presumption, then he must rebut the presumption by sufficient proof to produce a belief in the minds of the jury that negligence on his part did not in fact exist."

Mo. Pac. R. R. Co. *vs.* Foreman, 73 Tex., 311.

In many jurisdictions, like Maryland, where it is held that, in the absence of all evidence, it will be presumed that the decedent exercised reasonable care, it is said to be error to give an instruction like that here complained of, where there is any evidence from which it might be inferred that such care had not in fact been exercised.

In the case of Philadelphia, Wilmington and Baltimore R. R. Co. *vs.* Stebbing, 62 Md., 504, the court of appeals of Maryland held that it was error in that case to instruct the jury that they might "infer the absence of fault on the part of the plaintiff from the general and known disposition of men to take care of themselves, and keep out of the way of difficulty and danger."

In passing upon this instruction, Chief Justice Alvey said:

"With respect to the fourth prayer of the plaintiff, which was granted, in view of the facts of the case, we think it ought to have been refused, or if granted at all, it ought to have been in a modified form, to avoid the possibility of misleading the jury. It is certainly true, the motive to self-preservation is a principle of our common nature, and it is but rational to presume, in the absence of evidence to the contrary, that parties act under its promptings in view of impending danger. But, in such cases as the present, there

is a counter-presumption, when the proof does not show to the contrary, and that is, that every person charged with a duty involving the safety of himself or others, will perform that duty; so that in fact it is not often the case that these mere presumptions afford much assistance in arriving at correct or just conclusions. They ought not to be indulged to the exclusion of direct evidence to the contrary; and it is only where there is no reliable proof to the contrary, or there is rational doubt upon the evidence as to the acts or conduct of the parties, that such presumptions can properly be invoked. The jury ought not to be instructed in such terms as would justify them in acting upon the mere presumption of the absence of fault in either party, in disregard of the proof in the case, where there are facts and circumstances to be considered by them. The form of the instruction in this case is the same as that used in several cases that have come before this court, and where the instruction has been sanctioned; but the propriety of such instruction must always be determined with reference to the nature and state of the proof before the jury. It will not do to instruct them that it is competent for them, in connection with the facts and circumstances of the case, irrespective of the nature and force of such facts and circumstances, to infer the absence of fault on the part of either plaintiff or defendant, *from the known general disposition of men to avoid danger.* Such an instruction in many cases would be exceedingly misleading; and, we think, it was error to give it in this case in the form in which it was given."

And in the case of Texas and Pacific Railway Co. *vs.* Gentry, 163 U. S., 353, where no one personally witnessed the crossing of the track by the deceased, nor the running of the flat car over him, this court said per Harlan, J.:

"Manifestly it was not the duty of the court, when there was no evidence as to the deceased having or not having looked and listened for approaching trains before crossing the railroad track, to do more, touching the question of contributory negligence, than it did, namely, instruct the jury generally that the railroad company was not liable if the deceased by his own neglect contributed to his death, and that they could not find for the plaintiff unless the death of

the deceased was directly caused by unsafe switching appliances used by the defendant, and without fault or negligence on his part."

And so in the case at bar the trial judge should at least have contented himself with giving the ordinary instruction as to contributory negligence. The jury should not have been instructed in such terms as would and did justify them in acting upon mere presumption when there were facts and circumstances bearing upon the point to be considered by them. It was error to instruct them, in the face of the decedent's own narrative of the occurrence and the undisputed evidence that if he had looked he would have seen the approaching car, that they were free to assume that deceased had looked and listened from the known disposition of men to avoid danger.

One is not entitled to say that he was injured by the negligence of another if he, by the use of ordinary care, might have escaped the damage.

Davey *vs.* London & S. W. Ry. Co., 12 Q. B. D., 70 (1883).

Wakelin *vs.* London & S. W. Ry Co., 12 App. Cas., 41 (H. L. 1886).

The last case was one in which the dead body of a man was found at night near a level crossing, but there was no evidence of the circumstances surrounding his getting on the line. The mere omission to whistle was held not evidence of negligence causing the accident.

In the course of his opinion, Lord Watson said:

"I am of opinion that the onus of proving affirmatively that there was contributory negligence on the part of the per-

son injured rests, in the first instance, upon the defendants, and that in the absence of evidence tending to that conclusion the plaintiff is not bound to prove the negative. * * * In the course of the trial the onus may be shifted to the plaintiff so as to justify a finding in the defendant's favor to which they would not otherwise have been entitled."

In the case of the Bernina (1887), 12 Probate Div., 58, Lord Justice Lindley, giving a neat classification of the various kinds of negligence cases, divides his third class, viz., where A is injured by B by the fault, more or less, of both combined, into three subclasses, the third of which is where there has been as much want of reasonable care on A's part as on B's, and says:

"In such a case A can not with truth say that he has been injured by B's negligence, he can only with truth say that he has been injured by his own carelessness and B's negligence, and the two combined give no cause of action at common law."

In Sewall *vs.* N. Y., N. H. & H. R. Co., 171 Mass., 302, the plaintiff, a boy thirteen years of age, while riding a bicycle ran into defendant's train at a railway crossing. He was familiar with the crossing, but paid no attention to it and did not look out for the cars, but looked elsewhere. It was held that a verdict was properly directed for the defendant. The opinion cites other pertinent cases bearing on the point.

In Grand Trunk Ry. Co. *vs.* Ives, 144 U. S., 408, this court said:

"Although the defendant's negligence may have been the primary cause of the injury complained of, yet an action for such injury cannot be maintained if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured."

In conclusion, it may not be amiss to quote an extract from the opinion of this court in the recent case of Patton *vs.* Texas & Pacific R. Co., 179 U. S., 658, per Brewer, J. There the injury was to an employee. In such a case, says the court:

"The fact of accident carries with it no presumption of negligence on the part of the employer; * * * it is not sufficient for the employee to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony; and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

It is submitted that the judgment of the Court of Appeals of the District of Columbia should be reversed and that court instructed to reverse the judgment of the supreme court of the District and to remand the case with instructions to set aside the verdict and to grant a new trial.

FREDERIC D. MCKENNEY,
J. SPALDING FLANNERY,
Attorneys for Plaintiffs in Error.

WAYNE MACVEAGH,
Of Counsel.